E COPY

Supreme Court, U. S.
FILED
JUN 22 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1403.

FORBES LEASING AND FINANCE CORPORATION,
Petitioner,

v.

MARVIN LEBOWITZ,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF.

WILLIAM T. COLEMAN, JR.,
LAWRENCE SILVER,
2600 The Fidelity Building,
Philadelphia, Pennsylvania. 19109
Attorneys for Petitioner.

Of Counsel:
ROBERT W. MARIS,
DILWORTH, PAXSON, KALISH,
LEVY & COLEMAN.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX TO BRIEF.

	Page
I. Introduction	1
II. Argument	1
A. The Petition Is Not Moot as Petitioner Still Suffers and Shall Continue to Suffer Adverse Consequences From the Unconstitutional Attachment of Its Property	1
B. This Court's Decision in *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972) Puts to Rest Respondent's Objections to the Granting of the Petition for a Writ of Certiorari	3
1. Pennsylvania's Foreign Attachment Procedures Do Not Assure Procedural Due Process by Providing for Post Attachment Relief	4
2. The Procedural Due Process Rules Prohibiting Deprivation of Property Absent Notice and a Prior Hearing Reiterated in *Sniadach* Are Not Limited to Wages	4
3. Pennsylvania's Foreign Attachment Rules Are Not Sufficiently Narrowly Drawn to Protect Any State or Creditor Interest	5
4. This Court Has Already Recognized the Substantiality of Petitioner's Fourth Amendment Claim	6
III. Conclusion	7

TABLE OF CASES CITED.

	Page
Fuentes v. Faircloth, 317 F. Supp. 954 (S. D. Fla. 1970)	4
Fuentes v. Shevin, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972)	1, 2, 3, 4, 5, 6
Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N. W. 2d 87 (1970)	2
McKay v. McInnes, 279 U. S. 820 (1929)	5
Ownbey v. Morgan, 256 U. S. 94 (1921)	5
Sniadach v. Family Finance Corp., 395 U. S. 337 (1969)	4

RULES OF CIVIL PROCEDURE CITED.

	Page
Pennsylvania Rule of Civil Procedure, 1256	2

I. INTRODUCTION.

The purpose of this Reply Brief is to answer Respondent's incorrect suggestion of mootness, to demonstrate the applicability of the recent case of *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972) and to suggest reversal upon these papers.

II. ARGUMENT.

A. The Petition Is Not Moot as Petitioner Still Suffers and Shall Continue to Suffer Adverse Consequences From the Unconstitutional Attachment of Its Property.

Respondent, Lebowitz, has contended that because Forbes has posted a bond releasing the previously attached property this case is now moot. Respondent claims that Forbes has nothing to gain by victory in this Court (Respondent's Brief, p. 6). Obviously, Forbes would not have filed a costly Petition if it had nothing to gain. As Judge Becker stated in his Opinion below (App. A32-33), the posting of a bond would not and does not relieve the adverse consequences of an attachment:

> 1. Forbes secured a release of the funds presently attached by paying the annual bond premium of $1,560.00.[1] Each year that this litigation is pending Forbes shall be further obligated to pay $1,560.00.[2]

---

1. Necessarily some of the facts contained herein occurred after the record was closed in the lower Court. Although the cost of the annual premium is not of record, Judge Becker stated (App. A38) that if Forbes posted a bond it would have to "advance a substantial premium".

2. This litigation may be pending for a number of years. See Judge Becker's Opinion at A33:

> "It is true that the debtor may have the attachment dissolved by being successful in the law suit. Suffice it to say that in a contemporary metropolitan area, the Court backlog may prevent this method of dissolution for several years."

2. The posting of the bond pursuant to the stipulation of Counsel (App. SA4-SA5) and the applicable Pennsylvania Rule of Civil Procedure, 1256 (App. A58), does not prohibit Respondent from attaching an additional $120,000.00 of Petitioner's property pending the outcome of this litigation.[3] As Judge Gibbons (App. A7) observed, the impact of this threat of further attachment offends the Commerce Clause (App. A53) as Forbes must run the risk of the seizure of more of its property if it wishes to do business in Pennsylvania while this litigation is pending.

3. As Judge Becker in his Opinion below noted (App. A32; A38), the posting of a bond does not give Petitioner "full and unrestricted use of the funds . . ." as Respondent contends:[4]

> "The problem is that posting a bond involves more than paying a premium. The Court takes judicial notice of the fact that surety companies, more often than not, require security for posting of a bond which may take the form of cash or other property. *The existence of the bond obligation would have to appear on the accounting records of the corporation and, in many cases, would impair its credit standing.*" (App. A32) [Emphasis added.]

The incorrectness of Respondent's mootness contention is demonstrated by *Jones Press, Inc. v. Motor Travel Services, Inc.*, 286 Minn. 205, 176 N. W. 2d 87 (1970) cited with approval by this Court in *Fuentes v. Shevin*, — U. S. —, 40

3. Respondent's Writ of Attachment allows the seizure of a total of $200,000.00 (App. A12). Respondent has already caused approximately $78,000.00 to be seized (App. SA4).

4. Respondent's Brief, p. 6.

U. S. L. W. 4692, 4694 n. 5 (June 12, 1972). There a unanimous Supreme Court of Minnesota declared Minnesota's general attachment statute unconstitutional because the statute did not provide for prior notice and hearing. Defendant there posted a bond to secure the release of the attached property, accounts receivable.

> "Plaintiff argues that by posting a bond and releasing the garnishments defendant has waived its right to challenge the validity of the statute and has rendered the issue moot. We do not subscribe to that contention. The economic burden which defendant has sustained to achieve this result is one which stems directly from the garnishment proceedings. *It inflicts a hardship which is different only in form and not in substance.*" [Emphasis added.]

Contrary to Respondent's mootness contention, the issues are alive and ripe for consideration by this Court.

B. This Court's Decision in *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972) Puts to Rest Respondent's Objections to the Granting of the Petition for a Writ of Certiorari.

In *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972) this Court declared the replevin statutes of Pennsylvania and Florida unconstitutional because both replevin statutes provided for a seizure property absent notice and a prior hearing. In this connection the replevin statutes are identical to Pennsylvania's foreign attachment procedure.[5]

---

5. In fact, the replevin statutes in *Fuentes, supra*, were more protective of defendant's interests in that both statutes required plaintiff to post a bond. Pennsylvania's foreign attachment procedure does not require plaintiff to post any bond.

1. Pennsylvania's Foreign Attachment Procedures Do Not Assure Procedural Due Process by Providing for Post Attachment Relief.

Respondent has asserted (Respondent's Brief, pp. 7-8) that because the Pennsylvania foreign attachment procedure provides for post attachment relief that procedural due process has been accorded. To the contrary, *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. at 4696 held:

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone'. Stanley v. Illinois, — U. S. —, —."

2. The Procedural Due Process Rules Prohibiting Deprivation of Property Absent Notice and a Prior Hearing Reiterated in *Sniadach*[6] Are Not Limited to Wages.

Respondent has contended here and below that *Sniadach* announced a new due process rule prohibiting pre-notice and pre-hearing seizures of one type of property *viz.* wages (Respondent's Brief, pp. 9-11).[7] To the contrary, this Court in *Fuentes, supra*, at 4698 held:

> "*Sniadach* and *Goldberg* . . . were in the mainstream of past cases, having little or nothing to do with

---

6. *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969).

7. Respondent relies on *Fuentes v. Faircloth*, 317 F. Supp. 954 (S. D. Fla. 1970) for this contention. Obviously, this reliance is misplaced as this Court has reversed: *Fuentes v. Shevin*, — U. S. —, 40 U. S. L. W. 4692 (June 12, 1972).

the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect. *E.g., Opp Cotton Mills v. Administrator,* 312 U. S. 126, 152-153; *United States v. Illinois Cent. R. Co.,* 291 U. S. 457, 463; *Southern Ry. Co. v. Virginia,* 290 U. S. 190; *Londoner v. City & County of Denver,* 210 U. S. 373; *Central of Georgia v. Wright,* 307 U. S. 127; *Security Trust Co. v. Lexington,* 203 U. S. 323; *Hibben v. Smith,* 191 U. S. 310; *Glidden v. Harrington,* 189 U. S. 255. In none of those cases did the Court hold that this most basic due process requirement is limited to the protection of only a few types of property interests. While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine." [Footnotes omitted.]

3. Pennsylvania's Foreign Attachment Rules Are Not Sufficiently Narrowly Drawn to Protect Any State or Creditor Interest.

Respondent has contended (Respondent's Brief, pp. 11-12) that Pennsylvania's foreign attachment rules serve the governmental and creditor interest of providing personal jurisdiction. Respondent has relied upon *Ownbey v. Morgan,* 256 U. S. 94 (1921) and *McKay v. McInnes,* 279 U. S. 820 (1929). This Court in *Fuentes v. Shevin,* — U. S. —, 40 U. S. L. W. at 4699 n. 23 limited *McKay* to holding nothing more than *Ownbey.* As for *Ownbey* this Court said the seizure there was "*necessary* to secure jurisdiction in state court [Emphasis added]." Such is not the case here where Pennsylvania had jurisdiction over Forbes by way of long-arm statute (App. A5-A6; A36).

The question left open by *Fuentes,* deemed important by the Third Circuit (App. A6) and not dealt with by Re-

spondent in his brief is Forbes' alternative ground that the state lacks interest in the maintenance of attachments after jurisdiction has been secured by the defendant's general appearance, see Petition at p. 9.

4. This Court Has Already Recognized the Substantiality of Petitioner's Fourth Amendment Claim.

Petitioner asserts that Pennsylvania's foreign attachment rules are in violation of the Fourth Amendment (Petition at p. 20) and contrary to the contention raised by Respondent in his brief at p. 14 the Fourth Amendment issue raises a substantial federal constitutional question. This Court has recognized the substantiality of that Fourth Amendment contention, *Fuentes v. Shevin*, — U. S. —, — n. 2, — n. 30, — n. 32; 40 U. S. L. W. 4692, 4693 n. 2, 4700 n. 30, 4701 n. 32 (June 12, 1972). Although this Court recognized the substantiality of such a Fourth Amendment claim, it did not rule on that claim in *Fuentes, supra*. The resolution of this question was clearly reserved and should be the basis, *inter alia*, for granting the Petition of Writ of Certiorari in this case.

III. CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari and set this case for briefing and argument or reverse on these papers.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.,
LAWRENCE SILVER,
2600 The Fidelity Building,
Philadelphia, Pennsylvania. 19109
Attorneys for Petitioner.

Of Counsel:
ROBERT W. MARIS,
DILWORTH, PAXSON, KALISH, LEVY
& COLEMAN.

Certificate of Service.

I hereby certify that on this 22nd day of June, 1972 three copies of this Reply Brief were hand delivered to the office of Henry Stein, Esquire, Mesirov, Gelman, Jaffe and Levin, 1510 The Fidelity Building, Philadelphia, Pennsylvania 19109.

I further certify that all parties required to be served have been served.

LAWRENCE SILVER,
2600 The Fidelity Building,
Philadelphia, Penna. 19109
Attorney for the Petitioner